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IN THE

Supreme Court of the United States

October Term, 1968

No. 474

CHARLES CACI, also known as Bobby Milano, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as Pat Natarelli, FREDERICO G. RANDACCIO and LOUIS SORGI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION OF PASQUALE A. NATARELLI FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANTHONY J. DeMARIE,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Petitioners,

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UNITED STATES OF AMERICA.

PETITION OF PASQUALE A. NATARELLI FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition of PASQUALE A. NATARELLI demonstrates to this Court that on July 30, 1968 the United States Circuit Court of Appeals for the Second Circuit affirmed a conviction had against this petitioner and codefendants after trial by jury in the United States District Court for the Western District of New York at Buffalo.

The petitioner was sentenced by the HONORABLE JOHN O. HENDERSON, District Court Judge, to a twenty years term of imprisonment on the first count, five years imprisonment on the second count; the sentences to be served concurrently.

Petitioner is now confined to the United States Penitentiary at Atlanta, Georgia.

Excerpts from the Opinion as it Pertains to Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.
(Argued June 18, 1968 Decided July 30, 1968.)
Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CACI, also known as Bobby Milano, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as Pat Natarelli, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

Moore and Hays, Circuit Judges, and Timbers, District Judge.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314.

Affirmed.

* Of the District Court for the District of Connecticut, sitting by designation.

Paul Ivan Birzon, Buffalo, New York, for Apellant Caci.

Peter L. Parrino, Buffalo, New York, for Appellant Cino.

Salten Rodenberg, Buffalo, New York, for Appellant Natarelli.

Frank G. Raichle, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), for Appellant Randaccio.

Joseph P. Runfola, Buffalo, New York, for Appellant Sorgi.

Andrew F. Phelan, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), for Appellee.

HAYS, *Circuit Judge:*

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. § 1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§ 371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

3288

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. § 1951 and in the second count that appellants conspired in violation of 18 U. S. C. § 371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned rob-

beries was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went in to hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth

$400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was

known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

* * *

3291

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

* * *

3295

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone v. United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of [illegible]. The claim is frivolous.

3299

* * *

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. § 2314 until the goods have in fact been stolen is without merit. *Cf. Williamson v. United States*, 207 U. S. 425, 446-47 (1908).

* * *

3302

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick v. United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States v. Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States v. Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

3303

Jurisdiction

Petitioner seeks review of a judgment of conviction returned against him in the District Court for the Western District of New York, affirmed by the United States Court of Appeals for the Second Circuit in a judgment entered July 30, 1968. Petitioner has made no application for a rehearing.

There is jurisdiction in this Court to entertain an application for the granting of a writ of certiorari predicated upon the provisions of Section 1254 (1), Title 28 of the United States Code and Rule 19 (1) (b) of the Supreme Court Rules. The Court below has determined important questions of Federal law which have not but should be settled by this Court. Petitioner will argue herein that the lower Court has departed from the accepted and usual course of jurisdictional proceedings and the Appellate Court has so far sanctioned such departure, requiring an exercise of this Court's power of supervision.

Questions Presented for Review

1. Petitioner was accused of conspiring to interfere with the movement of money in commerce by robbery. The proof in support of the indictment demonstrated only that there would have been an interference with the movement of checks in commerce had the robbery been successful. Was not petitioner's right to *due process* thereby violated? Was not the proof submitted proof of a crime not charged in the indictment?

2. May petitioner be convicted for an obstruction to commerce not anticipated by the conspirators where the robbery was unconsummated? Is not the proof of an ob-

struction to commerce from the conspiracy not limited to the purview of the conspiracy?

3. Section 2314 of the United States Code requires that there be stolen money, goods, wares or merchandise in existence before the substantive Section may be violated. Does not a conspiracy pursuant to Section 371 of the United States Code require the existence of all of the elements of the substantive crime before a prosecution to so conspire may be maintained?

4. Whether the District Court deprived petitioner of his fundamental right to a fair trial by refusing to order pretrial disclosure of all of the conversations illegally monitored by a Government agency and so acknowledged by the prosecution, instead affording to the petitioner a post-trial hearing to determine "taint"?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V.

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Constitution of the United States, Amendment VI.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence."

Title 18 U. S. C. Section 371.

> Conspiracy to commit offense or to defraud United States
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . June 25, 1948, c. 645, 62 Stat. 701."

Title 18 U. S. C. Section 1951.

Interference with commerce by threats or violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115,

151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

Title 18 U. S. C. Section 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, Section 2, 75 Stat. 802."

Statement of the Case

The defendant and others were jointly indicated on August 18, 1967, tried and convicted for conspiring to obstruct commerce and the movement of money in commerce by robbery.

The second count of the indictment accused all of the defendants of conspiring to knowingly transport in interstate commerce stolen monies, goods and wares over the value of $5,000.00, knowing them to have been stolen: despite testimony to the grand jury that in fact no stolen money or other articles capable of transport ever came into being. The robberies which would have afforded the stolen monies and goods were aborted.

Before trial the defendant moved to dismiss Count II, arguing that since the substantive offense (Section 2314) required knowledge that the monies were actually stolen, there could not be an actionable conspiracy to contravene that Section, until stolen money or other goods were in ex-

istence. The Prosecution challenged this motion. The District Court refused to dismiss.

The Prosecution in response to a demand therefor, included in a bill of particulars requested by counsel for co-defendant FREDERICO G. RANDACCIO, admitted there had been illegal electronic surveillance of petitioner and of that co-defendant (Randaccio) during the month of February, 1965 and for some two years before that. The Assistant United States Prosecutor denied that any use had been made by the prosecution of the "fruits" of that illegal surveillance and asserted that the Attorney General's Office in Washington had assured him that the "fruits" of the surveillance were impertinent to the indictment (A. 23).*

The District Court denied petitioner's motion for an order directing the Prosecution to disclose to him all of the conversations illegally surveilled so that counsel for petitioner might determine if *in his opinion* there were any leads available to the Government by its trespass. That Court deemed it sufficient that petitioner and co-defendants be afforded a post-conviction hearing if petitioner was convicted (A. 26). Petiitoner sought mandamus from the Second Circuit Court of Appeals directing the District Court to afford him the requested hearing before trial. That request was denied (A. 27).

The Government disclosed in its opening to the jurors that the Prosecution would premise an interference with interstate commerce upon a showing that a successful robbery, as described in the first count, would include the taking of checks destined for transit interstate (A. 31).

The petitioner then moved (A. 30) for a dismissal of the first count, predicating that motion upon the opening

* A. Denotes Page number in the Appendix.

statement. The argument was that the anticipated offer of proof was outside the purview of the indictment returned by the grand jury, since the charging portion therein restricted itself to an interference with the movement of money therein. The Court summarily denied the motion (A. 31).

The Court admitted into evidence, over objection, testimony and exhibits that the money bag the petitioners allegedly conspired in the month of February, 1965 to steal, included therein checks payable out of state. However, testimony from the co-conspirator demonstrated that for all practical purposes the robbery was aborted on February 17, 1965.

Motions to dismiss each count of the indictment were renewed at the close of the People's case and denied. The motions were based on legal argument heretofore made (A. 31).

The petitioner requested post-conviction that the Court examine the grand jury minutes to determine if the grand jury based its indictment (Count I) upon an interference with the flow of checks in interstate commerce. The Court determined that there was a sufficiency of evidence for the grand jury to find that the conspiracy embraced an obstruction, delay or affect upon commerce by robbery as alleged in Count I (A. 26).

The Prosecution depended upon testimony for an alleged co-conspirator for its proof that the petitioners planned two robberies during the month of February, 1965.

The testimony of the witness PASCAL CALABRESE demonstrated the plan was originally formulated during the evening of February 5, 1965 at a meeting in Pasquale Natarelli's home. Calabrese there agreed with the petitioners

Frederico G. Randaccio, Pasquale A. Natarelli and Stephen A. Cino that he would travel to Los Angeles expressly to rob a woman of a great deal of jewelry, then, and in that order, to rob a messenger carrying a large sum of money from the Beverly Hilton Hotel to an armored car.

Calabrese would be assisted in these robberies by the petitioner Charles Cacci and Louis Sorgi, who were in Los Angeles. Charles Caci was an entertainer, then between jobs. Louis Sorgi was employed as chief security officer at the Beverly Hilton Hotel. Stephen Cino would follow Pascal Calabrese to the Coast and afford whatever additional assistance was needed.

Pascal Calabrese arrived in Los Angeles on February 7, 1965 followed by Stephen Cino a few days later. The conspirators met regularly to work out the most feasible way in which to rob the jewerly and the money. The plans were stalled because the woman did not arrive at the Beverly Hilton Hotel as was anticipated by the conspirators.

Several days later on or about February 17, 1965, the robberies were abandoned because Pascal Calabrese found out that he had been indicted for a robbery he had committed in Buffalo, New York. Stephen Cino had received a telephone call from his father-in-law who told him of the indictment and directed that he return to Buffalo immediately. Cino did forthwith return to Buffalo. Calabrese left California on February 17, 1965.

ARGUMENT IN SUPPORT OF THE GRANTING OF A WRIT

Point I

The Grand Jury indictment accused petitioner of conspiring to affect the movement of *money* in commerce by robbery. The Grand Jury did not indict petitioner for a conspiracy to affect the movement of checks in commerce by robbery. Yet, despite objection by counsel for the petitioner, the District Court permitted the Prosecution to premise its entire case upon a showing to the trial jury that a successful robbery would have impeded the flow of checks in interstate commerce, a crime separate and distinct from the crime charged to petitioner in the first count of the indictment.

Petitioner urges that the fact situation in the instant case is similar to if not stronger than the fact situation existing in *Stirone v. United States,* 361 U. S. 213.

Stirone, a union official, was prosecuted under the Hobbs Act, accused by the Grand Jury of obstructing the movement of materials and supplies (sand) from points outside Pennsylvania to a concrete manufacturing plant of a manufacturer in Pennsylvania. This manufacturer had a contract to supply concrete from his Pennsylvania plant to be used for the erection of a steel processing plant at another point in Pennsylvania. The trial Court there, over the defendant's objection, permitted the Government to offer evidence of defendant's interference, not only with the shipments of supplies and materials (sand) as above, *but also with prospective steel shipments from the Pennsylvania steel processing plant later to be built with the manufacturer's concrete.*

This Court determined reversal of that conviction was required (See page 217 thereof). The indictment here

> ". . . cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The Grand Jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error . . . The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

The District Court ignored or did not appreciate that an obstruction to the movement of checks in commerce is a different crime from an obstruction to commerce caused by the interference with the movement of money therein, despite that the means employed may be the same, *i.e.:* robbery. The same robbery might well obstruct commerce in more ways than one, but each obstruction is a distinct and independent crime and must be alleged by the grand jury to be prosecutable.

Petitioner submits that the proof offered to the trial jury against Stirone included proof therein that Stirone was guilty as charged in the indictment, attended by additional proof that commerce was affected in a manner not charged by the grand jury. The Prosecution in your petitioner's case made no attempt to prove the obstruction charged in the indictment.

The Appellate Court considered this argument frivolous, a conclusion petitioner respectfully disputes.

Point II

The Second Circuit determined that:

> "The instruction by the trial Judge to the jurors that the defendants need not have intended to affect commerce in order to be guilty was entirely correct."

and based its conclusion on *Nick v. United States,* 122 F. 2d 600, Cert. denied, 314 U. S. 687: *United States v. Varlack,* 225 F. 2d 665: *United States v. Pranno,* 385 F. 2d 387, Cert. denied, 390 U. S. 944. But those cases relied upon by the Appellate Court are all cases of consummated crimes, distinguished from the instant case. The record is devoid of proof from which the jurors might conclude or infer that an interference with the flow of checks in commerce was either one of the objects of the conspiracy or that the defendants knew or could foresee that such interference would be provoked from the conspiracy to rob a messenger.

The proof offered by the Government in support of a conviction violative of the Hobbs Act would be pertinent had the crime been consummated. The original intent would not be a defense to a conviction since an actual taking would have occurred flowing from his act. The Second Circuit reversed a conviction and dismissed an indictment against

Russell Bufalino and others 285 F. 2d 415, predicated in part upon similar reasoning.

Point III

Petitioner challenges the validity of the second count of the indictment wherein he is accused of conspiring to transport in interstate commerce stolen money, knowing it to have been stolen, despite that no money or other goods susceptible of such transportation in interstate commerce was stolen. The sensible meaning and intendment of the substantive section petitioner was therein accused of conspiring to violate (Section 2314 of the United States Code) is to prohibit, by punishment therefor, illegal transportation in interstate commerce of money over the value of $5,000.00, knowing it to have been stolen.

The language used in Section 2314 anticipates the existence of "stolen money" as an indispensable condition precedent to the effective consummation of that crime or a conspiracy to do so. *Without "stolen money", the crime of transportation cannot occur, for there is no "corpus" available for transport as proscribed by Section 2314. Therefore, an agreement between the defendants is not punishable for a violation of that Section until the "corpus" is born;* this is not an agreement within the intendment of the provisions of the substantive offense. In such a fact circumstance, any alleged overt act or acts cannot effect the object of the conspiracy, a prerequisite of the requirements of Section 371 of the United States Code.

It is agreed that Federal Courts have determined an act done in furtherance of a conspiracy is sufficient to come within the purview of Section 371 of the United States Code. But, it is respectfully suggested that this is error. Section 371 requires that an overt act to be criminal must

be to *effect the object of the conspiracy,* distinguished from an act done in furtherance thereof.

Petitioner concludes that unless and until there are stolen goods capable of transport, any charged overt act is not an overt act within the intendment of Section 371 as it applies to a conspiracy to violate the proscriptions of substantive Section 2314.

Point IV

Kolod v. United States No. 133 granting certiorari January 29, 1968, reargued May 2, 1968, is in support of petitioner's argument that he ought to have been given all of the illegally electronically monitored conversations the Government had in its possession; the reasoning there being applicable:

> "We read the response as admitting that Alderisio's conversations were overheard by unlawful electronic eavesdropping but as justifying nondisclosure on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution. We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court. Accordingly we grant the petition for certiorari . . ."

That no sensible argument that the Government's proof was "tainted" could be made by petitioner without knowledge of the substance of all of the monitored conversations. That the post-conviction hearing afforded the defendants was an inadequate substitute since the District Court did not direct full prior disclosure to the defendants. The District Court determined for itself the relevancy of all of the monitored conversations, except for those conversations had in February, 1965. Thereby the Government agency pursuing illegal monitoring not only goes unpunished, but

is permitted to withhold what in the judgment of petitioner might be relevant to an argument of "taint", predicated on an assurance by the prosecution that there was no such "taint". *United States v. Birrell,* 692 S. D. N. Y., May 23, 1967, is distinguishable since Birrell had had a pretrial hearing which is all petitioner sought.

Conclusion

The petition for a writ of certiorari to review the conviction had against petitioner in the District Court for the Western District of New York and the affirmance thereof by the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX "A"

Letter from Prosecutor Admitting Electronic Surveillance

Andrew F. Phelan
AFP:tr

Civil No. 1967-94
Civil No. 1967-115
Civil No. 1967-116

September 19, 1967

Hon. John O. Henderson
United States District Judge
United States Courthouse
Buffalo, New York 14202

Re: United States v. Frederico G. Randaccio, *et al.*
United States v. Charles Caci, *et al.*
United States v. Thomas Carella, *et al.*

Dear Judge Henderson:

In response to the request of defense counsel made this morning, concerning the existence of electronic surveillance coverage of any of the above-named defendants, such request being made in connection with their motion to suppress, please be advised as follows:

1. During the period of time encompassed by these indictments, the defendants Frederico G. Randaccio, Pasquale A. Natarelli, and Salvatore Pieri, a/k/a Sam Pieri, were on premises that were being electronically surveilled (by trespass) and were participants in various conversations electronically monitored by a federal investigative agency. These are the only defendants and/or co-conspirators named in the above-captioned indictments who were the sub-

jects of any electronic suhveillance known to the Government.

2. The substance of the monitored conversations involving the foresaid defendants was recorded in written logs which are presently within the possession of the Government. Neither counsel for the Government nor any agents connected with the investigation of these cases have ever seen these logs. The logs have been reviewed by the Department of Justice and I am advised that none of the material contained in these logs is relevant or material to the subject matter of the cases presently pending trial.

3. The Government affirmatively states to the Court, and is prepared to submit an affidavit should the Court so desire, that none of the material obtained from such electronic surveillance was a source, either directly or indirectly, which gave rise to the criminal action pending against these defendants; that none of the material obtained therefrom is to be used as evidence in any of the above-captioned cases; nor were any leads to any evidence which the Government will offer on the trial of these cases developed, either directly or indirectly, from such electronic coverage.

Very truly yours,

JOHN T. CURTIN,
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APPENDIX "B"

Affidavit from Prosecutor Disclaiming Use of Fruit of Electronic Surveillance

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FREDERICO G. RANDACCIO, *et al.,*

Defendants.

CR. 1967-94.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES CACI, *et al.,*

Defendants.

CR. 1967-115.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS CARELLA, *et al.,*

Defendants.

CR. 1967-116.

AFFIDAVIT

State of New York,
County of Erie,
City of Buffalo. } ss.:

ANDREW F. PHALEN, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Western District of New York, and that in such capacity, he has been assigned to represent the Government on the trial of criminal matters numbered CR. 1967-94, CR. 1967-115 and CR. 1967-116, now pending in the United States District Court for the Western District of New York.

2. That your deponent, on September 19, 1967, pursuant to request of defense counsel in CR. 1967-115 made on

September 19, 1967, advised the Court of the existence of monitored conversations of certain of the defendants named in the aforesaid indictments; namely, Frederico G. Randaccio, Pasquale A. Natarelli, and Salvatore Pieri, a/k/a Sam Pieri, by electronic surveillance during the period of time encompassed by the said indictments.

3. That logs containing the substance of these monitored conversations are in possession of the Government, but that your deponent has not seen these logs.

4. That none of the material obtained from such electronic surveillance was a source, either directly or indirectly, which gave rise to the aforesaid criminal indictments now pending against these defendants; that none of the material obtained therefrom is to be used as evidence in the trial of any of the aforesaid indictments; nor were any leads to any evidence which the Government will offer on the trial of the aforesaid indictments developed, directly or indirectly, from such electronic coverage.

/s/ ANDREW F. PHELAN,
Assistant United States Attorney.

Subscribed and sworn to before me
this 20th day of September, 1967.
/s/ Ann K. O'Donnell,
Notary Public, State of New York,
Qualified in Erie County,
My Commission expires Mar. 30, 1969.

APPENDIX "C"

Order from Henderson, J. Denying Pre-Trial Hearing

The Government has acknowledged that during the period covered by the indictment, the defendants Randaccio and Natarelli were on premises subject to electronic surveillance by trespass and that these defendants participated in conversations monitored by a federal investigative agency. The Government represents, however, that this information neither directly nor indirectly gave rise, through leads or otherwise, to the present prosecution. The Government further represents that the logs of those conversations have been reviewed by the Department of Justice and that none of the information contained in these logs is relevant or material, in any manner, to the present indictment. The Government also states that neither counsel nor any agents connected with the prosecution of this case has seen the logs in question.

While it indicates that it is fully prepared to establish these facts upon an evidentiary hearing, the Government, for a number of reasons, requests that this hearing be held after trial. The defendants, on the other hand, seek an immediate pretrial hearing on this issue.

The considerations which prompted Judge Herlands to approve the posttrial procedure in *United States v. Birrell*, 61 Cr. 692 (S. D. N. Y., May 23, 1967), appear to apply equally to the facts of this case.

The defendants argue that since the Supreme Court remanded for a hearing and a new trial in *Black v. United States*, 385 U. S. 26 (1966), that Court has expressly disapproved posttrial hearing procedure in cases involving electronic surveillance. As is demonstrated by the Supreme

Court's later remand for a posttrial hearing in *Hoffa v. United States*, 387 U. S. 231 (1967), the handling of *Black v. United States, supra,* was based upon the peculiar facts of that case. While certainly not authority for holding a posttrial hearing under the present circumstances, *Hoffa v. United States, supra,* demonstrates that no basic constitutional infirmity exists with respect to such procedure.

The Government's application for a posttrial hearing is granted.

So ordered.

/s/ JOHN O. HENDERSON,
JOHN O. HENDERSON,
United States District Judge.

Dated: September 26, 1967.

APPENDIX "D"

Order Denying Mandamus

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Petition
of
FREDERICO G. RANDACCIO.

Before FRIENDLY, HAYS and ANDERSON, *C. JJ.*

Motion for a writ of mandamus etc.

For a writ of mandamus compelling the HON. JOHN O. HENDERSON, Judge of the United States District Court for

the Western District of New York to vacate his order entered September 26th, 1967, denying petitioner's motion for an order directing that a hearing be held prior to trial at which time the United States of America would be required to prove beyond a reasonable doubt that the evidence which it intends to introduce against the petitioner at the trial is untainted by the evidence unlawfully seized from the petitioner during the time covered by this indictment by the use of electronic surveillance conducted by trespass, and compelling him further to grant petitioner's relief requested in said motion, or in the alternative to entertain objections at the trial to the evidence offered by the United States of America on the Ground that it is so tainted,

Also, for a writ of mandamus compelling the Hon. John O. Henderson, Judge of the United States District Court for the Western District of New York to vacate his order entered on September 28th, 1967 denying petitioner's motion for an order directing that he be accorded a preliminary hearing under Rule 5(c) of the Federal Rules of Criminal Procedure and compelling him further to grant the petitioner's relief requiring such a preliminary hearing be held, or in the alternative,

To issue such a writ necessary and appropriate to aid in the equitable invocation of well established principles of law.

LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER and JAMES,
Buffalo, New York, *for Petitioner,*

Herald Price Fahringer, *of counsel.*

10/4/67

The petitions for mandamus and for a stay are denied.

While F. R. Cr. P. 41(e) requires motions to suppress evidence to be made in advance of trial save where there is good cause for failing to do so and the judge should ordinarily dispose of such motions in advance of trial, the rule does not require him to do so. As to this we agree with the opinion of Judge Aldrich in United States v. Leiser, 16 F. R. D. 199 (D. Mass. 1954). Still more clearly the Rule does not require the judge to conduct a pre-trial hearing that would go beyond the suppression of the evidence alleged to have been illegally seized and would seek to determine what use the government intends to make of it; whether to conduct such an inquiry in advance of trial and, if so, to what extent rests in the sound discretion of the trial court. So far as concerns defendants' rights to discovery under Rule 16 the Government has now agreed to make available the logs of the electronic surveillance during any relevant period.

We do not mean our denial of the writ to be taken as necessarily sanctioning the postponement of determinations with respect to illegally obtained evidence until after the trial. This could well be unfair to a defendant unless the Government agreed, as it apparently has done here, that admission of any material evidence found to have been obtained in violation of a defendant's constitutional rights shall require dismissal of the indictment.

We have considered the alternative argument as to denial of a hearing under F. R. Cr. P. 5(c) as a result of the intervening indictments and find it without merit.

H. J. F., P. R. H., R. P. A.,
U. S. C., JJ.

APPENDIX "E"

Motion to Dismiss Count I of the Indictment After Prosecution Opening

The Court: All right.

Mr. Rodenberg: Firstly, your Honor, the argument I am about to make is predicated on Stirone against the United States, [137] decided in 1960. This is 80 Supreme Court, Page 270. Now, if your Honor will notice, the indictment against these defendants, of course, the offense is the interference, sir, with commerce. Now, the first count of the indictment reads this way, that these defendants, and with other persons whose names are unknown to the grand jury, to obstruct, delay and effect commerce and the movement of money in commerce by robbery. Your Honor, I submit that this is the charging portion of the indictment, this is the offense which the grand jury, sir, has chosen to lay against these defendants, that the interference which would come from a successful conspiracy to rob, would interfere with the movement of money in commerce. There is no reference, sir, to negotiable instruments, which, of course, checks are, which are entirely different from money. Now, this is more than a variance or [138] technicality, it is clearly expressed in Stirone against the United States. There, sir, the defendant had been charged with unlawfully obstructing, delaying interstate commerce between the several states and the movement of aforesaid materials and supplies in such commerce by extortion. The supplies and materials were to be shipped to the site of his plant for the manufacture or mixing of ready-mix concrete and, more particularly, they came from outside the state of Pennsylvania. The point is that because the offense is the interference with com-

merce, and the only allegation in this indictment is that the movement of money would be affected, not checks; that if Mr. Phelan intends to prove the offense, that is, the interference with commerce, by introducing checks, he is completely outside the purview of this indictment; that checks are not material proof. If this is the [139] only proof he will submit that there would have been an interference, of course, on the basis of his opening statement the indictment must fall. As I say, sir, Stirone against the United States is almost directly in point with the argument being made here. If your Honor would like, I have the citation here. I could hand it up to the Bench.

The Court: It isn't necessary. Is that your argument?

Mr. Rodenberg: That, sir, is the argument.

The Court: Denied. Call the jury back.

APPENDIX "F"

Excerpt from Opening Statement by the Prosecutor, Andrew Phelan

[129] I did mention to you that the Government must establish an affect upon interstate commerce. Although the defendants need not know, the [130] co-conspirators need not know what the affect will be at the time of their agreement. I believe the Government's proof in this case will show that the messenger for the Armored Transport Company was transporting proceeds, daily proceeds, from the Beverly Hilton Hotel to a Bank in Beverly Hills, in this case the United California Bank. The pouch in which the proceeds were, contain money, cash and checks, both personal checks and travelers checks. The records of the Beverly Hilton Hotel clearly establish where the checks

were drawn on for each of the days throughout the period of this indictment, that being February, 1965. The records of the Hotel will establish travelers checks by number that were cashed at the hotel. Personnel from the hotel will appear as witnesses, and I believe the the testimony will be that each of the checks taken in by the hotel went into the pouch, [131] were transported by the messenger to the United California Bank.

These items, checks and articles which are moving in the stream of interstate commerce, once they are negotiated at the Beverly Hilton Hotel to be paid on or for encashment, they must of necessity do to the home state bank on which they were drawn. In the case of the travelers checks, they must clear the home office. The stream commences, ladies and gentlemen, at the time they are cashed. They must go, as of that moment, according to regular, normal, banking procedures, they go from the desk of the cashier of the Beverly Hilton by messenger to the United California Bank by direct delivery, and from the United California Bank to the home bank or from there to the Federal Reserve Bank of Los Angeles and from the Federal Reserve Bank to the home bank. They are in the stream of interstate commerce from [132] the moment they are cashed. Each step moves them further along their way. I submit to you that if the Government establishes its burden on this element, with the conspiracy to rob this messenger and the breaking of that stream of interstate commerce, the affect, the obstructing of the delivery and the transportation of those checks, those items, with the conspiracy to commit the robbery of that messenger, it could not be obstructed or broken in any much more serious manner than to sever it right there. This then, frankly, is the proof we expect to offer.

As I have said, we do not consider it an extremely involved situation. I believe the Government's proof will establish beyond a reasonable doubt the establishment of an agreement and, certainly, numerous acts in furtherance of the successful execution of this agreement. These individuals were then, prepared to [133] execute the robberies, as planned; that because of an unforeseen circumstance, it stopped at a point, the robberies were never successfully effectuated. Those are the charges, they did conspire to commit these acts.